be clear, however, that judicial discretion should be exercised, not at the caprice of the chancellor, but on equitable principles; and that the interest of the public can be no excuse for impairing the obligation of the mortgagee's contract or for depriving him of his security without due process of law. The rule finds its strongest support in the analogy from admiralty where claims for seamen's wages, salvage, and repairs are given priority over the mortgage lien.[7] In all three groups of cases where preferences are permitted, as in these admiralty cases, the debts are based upon considerations which have resulted in direct benefit to the mortgagee; and it is believed that the true principle underlying the decisions is the equitable doctrine of unjust enrichment. Where the subsequent creditor preserves or increases the value of the security, the law implies a promise by the mortgagee to allow such creditor priority.

It must be admitted, however, that some cases will not square with this theory. For example, the United States Supreme Court recently refused to give preference to a claim arising from the preservation of the road, and distinguished such claims from those incurred in its operation. *Gregg* v. *Metropolitan Trust Co.*, U. S. Sup. Ct., March 6, 1905. Furthermore, there is a wide conflict of authority as to the time before the appointment of a receiver within which claims must have accrued in order to receive preference. Some cases leave the matter to the discretion of the court,[8] while others fix the limit variously at a reasonable time,[9] six months,[10] or the period of the statute of limitations.[11] If the ground on which the preference is given is the unjust enrichment of the mortgagee, the right to the preference should vanish only when the benefits are no longer appreciable at the time the receiver is appointed.[12] The situation is analogous to that where money is deposited in a consciously insolvent bank. The depositor is preferred so long as the deposit can be traced in the increased assets of the bank. And finally, if this theory of quasi-contract were logically applied there would be no reason for limiting the rule allowing preferences to cases where a receiver is appointed and the corporation is a quasi-public one.[13]

PERFECTING AN INCHOATE RIGHT AS A PREFERENCE. — Bankruptcy Acts usually provide that transfers of property made within a prescribed period before the filing of the petition in bankruptcy shall be deemed preferences if they result in giving to one creditor a greater portion of his debt than to other creditors of the same class. Under what circumstances a creditor can perfect within such period an inchoate right previously acquired has been the source of much conflict under early bankruptcy legislation. It was comparatively simple to require that the property should not be obtained by an

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[7] The Feronia, L. R. 2 A. & E. 65.

[8] Central, etc., Co. *v.* East Tennessee, etc., R. R., 80 Fed. Rep. 624.

[9] Wood *v.* N. Y., etc., R. Co., 70 Fed. Rep. 741.

[10] Rutherford *v.* Penn., etc., R. R. Co., 178 Pa. St. 38. See Fosdick *v.* Schall, 99 U. S. 235.

[11] Brandenstein *v.* Way, 17 Wash. 293.

[12] See Hale *v.* Frost, 99 U. S. 389.

[13] Merchants' Bank *v.* Moore, 106 Ala. 646 (limited to quasi-public corporations). See Bound *v.* South Carolina Ry. Co., 47 Fed. Rep. 30 (applied only when mortgagees ask for a receiver).

act done immediately before the insolvency proceedings commenced, but it was difficult to discover from the cases exactly how much "perfecting" the courts would allow within the prohibited period. Thus a creditor who, just before the bankruptcy of his debtor, had exchanged an invalid bill of sale for a good legal mortgage was regarded as having secured a preference,[1] whereas a mortgagee who by taking possession within the proscribed period made valid an inoperative mortgage on future acquired property was held not to have been unduly preferred.[2] The difficulty of reconciling such cases doubtless influenced many courts to take advantage of the recent Bankruptcy Act to throw off the burden of hair-splitting distinctions. This is shown by a late decision of the Massachusetts Supreme Court,[3] holding that the once leading cases of Chase *v.* Denny[4] and Sawyer *v.* Turpin[5] are no longer controlling under the present Act, and that where a mortgagee must take possession in order to perfect his lien and fails to do so until within four months of the filing of the petitions he must be taken to have received a preference. In other courts also the clear and workable rule has been gradually taking form that a transfer should be regarded as having taken place at the time when it first became effective against creditors.[6] That this is a fair construction of the Act seems clear from the amendment to section 60 a, which provides that "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required."[7]

In view of these facts it is to be regretted that a recent decision by the Supreme Court of the United States has thrown the law upon this subject back into its former confusion. By the law in Vermont the mortgagee of chattels to be acquired by the mortgagor in the future course of his business can obtain a lien valid against creditors only by taking possession of the property.[8] The defendant being for nine years the holder of such a mortgage had taken possession only within four months of the filing of the petition against the mortgagor. The court held that the mortgagee's right, although perfected within the proscribed period, related back to the time when the mortgage was given and did not constitute a voidable preference. *Thompson* v. *Fairbanks*, 196 U. S. 516. Since the purpose of forbidding preferences is evidently to prevent one creditor from obtaining a greater percentage of his debt than any other creditor of the same class, the institution of bankruptcy proceedings should be a boon to an unsecured creditor, but under the present decision they may operate as a positive detriment. When, as actually happened in the present case, he attaches the property before the mortgagee takes possession, he acquires, if no proceedings follow, a lien prior to that of the mortgagee. But if proceedings are instituted their effect must be not only to dissolve his lien,[9] but also to deprive him of his percentage on the property by perfecting the subsequent claim of the mortgagee.

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[1] Barnes *v.* Copeland, 147 Mass. 388.

[2] Chase *v.* Denny, 130 Mass. 566.

[3] Tatman *v.* Humphrey, 184 Mass. 361. (This decision was reversed in Humphrey *v.* Tatman, decided by U. S. Sup. Ct., April 17, 1905.)

[4] *Supra.*

[5] 91 U. S. 114.

[6] *In re* Klingaman, 4 Am. B. Rep. 254; Matthews *v.* Hardt, 9 Am. B. Rep. 373; *In re* Ball, 123 Fed. Rep. 164. *Contra*, Sabin *v.* Camp, 98 Fed. Rep. 974.

[7] Crooks *v.* People's Bank, 3 Am. B. Rep. 238.

[8] Peabody *v.* Landon, 61 Vt. 318.

[9] See Bankruptcy Act of 1898, § 67 c.